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No. 07-89

IN THE

SUPREME COURT OF THE UNITED STATES

WILSON BILLY ROBITAILLE,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Should this Court grant certiorari review of Robitaille's claim that the trial court violated his right to be present at his trial by removing him from the courtroom without his express waiver?

2. Should this Court grant certiorari review of Robitaille's claim that the trial court improperly admitted hearsay testimony?

3. Should this Court grant certiorari review of Robitaille's claim that the prosecutor made improper comments during the trial?

4. Should this Court grant certiorari review of Robitaille's claim that Alabama law disallows state appellate courts from reviewing ineffective assistance of counsel claims on direct appeal?

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DECISIONS BELOW

On November 23, 2005, the Alabama Court of Criminal Appeals affirmed Wilson Billy Robitaille's capital murder convictions and death sentence. *Robitaille v. State*, CR-01-2271, 2005 WL 3118795 (Ala. Crim. App. Nov. 25, 2005). (Pet. App. A.) On April 27, 2007, the Supreme Court of Alabama denied Robitaille's petition for writ of certiorari, without opinion. (Pet. App. B.)

STATEMENT OF JURISDICTION

This Court has jurisdiction over this case, pursuant to 28 U.S.C. § 1257(a), but Robitaille has not stated compelling grounds for this Court to exercise its discretionary review. In fact, Robitaille has not articulated any grounds for this Court to invoke its jurisdiction under Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The constitutional amendments involved in this case are set forth on pages two and three of Robitaille's petition. Robitaille accurately sets forth the text of the Fifth, Sixth, and Fourteenth Amendments, but those amendments were not violated in this case.

STATEMENT OF THE CASE

A. State Court Proceedings

On June 26, 2001, the grand jury indicted him on six counts of capital murder. (C. 167-169.)[1] Count one was for the intentional murder of Alisa Taylor, Robin Taylor, and Trent Taylor as a part of the same plan or scheme. Count two charges the intentional murder of Trent Taylor, a child under the age of fourteen years. Count three charges the intentional murder of Robin Taylor, a child under the age of fourteen years. Counts four, five, and six charge the intentional murder of Alisa Taylor, Trent Taylor, and Robin Taylor during the commission of robbery in the first degree, respectively. (C. 5.) The Honorable Bobby R. Aderholt presided over this case. (R. 1)

On July 20, 2002, the jury returned a unanimous verdict of guilty of all six counts of capital murder. (R. 1380-1382, C. 35-40.) The penalty phase was conducted on the same day. After being properly instructed and hearing the arguments of counsel, the jury returned an advisory verdict unanimously recommending the death penalty. (R. 1430, C. 33.)

On August 9, 2002, Robitaille was sentenced to death in accordance with the jury's unanimous recommendation. (R. 1447.) Robitaille appealed, and the Alabama Court of Criminal Appeals affirmed. *Robitaille v. State*, CR-01-2271, 2005 WL 3118795 (Ala. Crim. App. Nov. 25, 2005). (Pet. App. A.) Robitaille petitioned the Alabama Supreme Court for certiorari review. The

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[1] References to the reporter's transcript on direct appeal will appear in this brief as "R.__." References to the clerk's record on direct appeal will appear in this brief as "C. __."

Alabama Supreme Court denied certiorari without opinion. (Pet. App. B.)

B. Statement of the Facts

The Alabama Court of Criminal Appeals summarized the facts presented at Robitaille's trial in its November 23, 2005 opinion, as follows:

> In the early morning hours of [May] 11, 2001, the defendant drove up to Hamilton, Alabama, from Phenix City, Alabama, to burglarize the home of a couple whom he had met while living in Hamilton during the late 1990's. This couple owned a jewelry store and he thought he knew where jewelry was kept in their home. After arriving in Hamilton he slept in his car until daylight and then went to a gas station convenience store and visited with some of his old acquaintances. He then drove to a place near the home of the couple whose home he planned to burglarize and parked his car on a side road nearby. He waited for the couple to leave home for work but the man did not leave. He decided to abandon the burglary plan and just borrow enough money from someone to get back to Phenix City. Although he met someone he was going to borrow the money from his pride would not let him ask for the money.
>
> He wound up at the home of Stuart Taylor and wife Alisa and their two children. He had worked for the Taylors previously and had actually lived in a camper in their backyard while working

on their house. He was well acquainted with the Taylors. He knocked at the kitchen door at the Taylor home and was invited in by Alisa Taylor. They sat down at the kitchen table and were engaged in conversation when Alisa exited the room to tend to the children. While she was gone Robitaille noticed Alisa's purse on the counter and went over to get enough money to buy gas to get him back to Phenix City. Again he was too proud to ask for it. He was in the act of going through her purse when she unexpectedly reentered the kitchen and saw what he was doing. She ran over to him and tried to stop him. This was the beginning of one of the most horrifying events that has ever taken place.

Robitaille began stabbing Alisa Taylor with a leatherman's or multipurpose tool. [Alisa] tried to get away by running to another room. He followed her and when Robin began screaming he got a steak knife and went after her. [Robin] was able to get out of the kitchen door on the carport but Robitaille caught her and brought her back into the house. He broke the blade of one steak knife off in her back and then got another and followed her into her bedroom and stabbed her until she was dead.

He then went upstairs where Alisa and Trent were. Alisa asked him why he was doing this. He replied that he had gone too far now. He then proceeded to stab her

until she was lying helpless and dying on the floor. He then hunted Trent down where his mother had told him to hide in a storage area behind a door in the bedroom and stabbed him to death. Then he went back out in the hall and told Alisa that he was sorry but she was not able to speak as she drew her last breath. He obviously went back to each victim and stabbed them again just to make sure they were dead since some of the stab wounds did not bleed, indicating no blood pressure at the time they were inflicted.

After making sure that all three were dead he then proceeded to steal bottles filled with coins, knives, scissors, and Alisa's purse with its contents. Then he fled to Phoenix City where he was arrested. He later took police to a swampy area where he had disposed of Alisa's purse and some of the murder weapons.

The State's evidence also tended to show that on May 11, 2001, Stuart Taylor arrived at his home and discovered the bodies of his wife and daughter. His son's body was later discovered by police. Dr. Joseph Embry testified that all three victims had been stabbed to death-Alisa had been stabbed 18 times, Robin had been stabbed 17 times, and Trent had been stabbed 10 times.

Stuart Taylor testified that he knew Robitaille because Robitaille had worked with him at Fikes Chevrolet-Buick automobile dealership and had also done

work on his house. He said that approximately one year before the murders Robitaille had lived in a camper behind his house. At the time of the murders Robitaille was living in Phenix City with his girlfriend.

The State also presented evidence indicating that Robitaille confessed to murdering Alisa, Robin, and Trent Taylor. He gave a detailed account of the injuries that he had inflicted on each victim. Robitaille's statements were corroborated by the wounds each victim sustained. Robitaille also led police to a swampy area in Lee County where he had disposed of Alisa's purse and several knives that were used in the murders.

Robitaille testified in his own defense and offered his own account of the events leading up to the triple homicide. He testified that he had worked for Stuart Taylor delivering drugs to Tennessee and that on the day of the murders he was scheduled to travel to Tennessee to deliver crystal methamphetamine. While he was in Hamilton, he said, he decided to visit Alisa Taylor. Robitaille said that when he was in the house he heard a noise and started to walk down the stairs. Someone, he said, hit him on the shoulder and the next thing he remembered was waking up in his girlfriends's sport-utility vehicle. He went back inside the house, he said, and discovered the bodies of Alisa and Robin.

> The jury chose not to believe Robitaille's account of the events but instead convicted Robitaille of six counts of capital murder.

Robitaille, 2005 WL 3118795, at *1-2.

REASONS FOR DENYING THE PETITION

I. This Court Should Not Grant Certiorari To Review Robitaille's Claim That The Trial Court Violated His Right To Be Present During His Trial.

In Issue I of his petition, Robitaille contends that the trial court violated his right to be present at trial by improperly removing him from the courtroom during one witness's testimony. (Pet. at 11.) This Court should deny certiorari on this claim for the following reasons:

A. This Claim Is Not Worthy Of Certiorari Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye v. Noia*, 372 U.S. 391, 436 (1963); Rule 10, Rules of the Supreme Court of the United States ("A petition for writ of certiorari will be granted only for compelling reasons."). In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact.

Robitaille has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow

scope and limited precedential value that it is not worthy of certiorari consideration. This Court should, therefore, deny certiorari review of this claim.

B. This Court Should Deny Certiorari Because This Claim Is Without Merit.

In his petition, Robitaille asserts that the trial court violated this Court's ruling in *Taylor v. United States*, 414 U.S. 17 (1973), when it removed him from the courtroom during trial. Robitaille cites no additional authority in support of this claim. Because Robitaille expressly requested to be removed from the courtroom during one witness's testimony and returned to the courtroom thereafter, the trial court properly granted Robitaille's request. This Court should, therefore, deny certiorari review because this claim is meritless.

Initially, as this Court held in *Taylor*, "the right at issue is the right to be present, and the question becomes whether that right was effectively waived by his voluntary absence." 414 U.S. at 20. Like the petitioner in *Taylor*, who was denied the same relief Robitaille pursues because he was deemed to have voluntarily waived his right to be present when he failed to return for the afternoon session of the first day of his trial, Robitaille likewise chose to be absent for a portion of his trial and knew that the trial would proceed in his absence. *Id.* Furthermore, "there can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." *Id.* (citing *Illinois v. Allen*, 397 U.S. 337, 349 (1970).

Rule 9.1 of the Alabama Rules of Criminal Procedure governs the defendant's right to be present. The Committee Comments address this issue directly:

> The amendment to Rule 9.1 (b)(2) allows a defendant charged with a capital offense to waive his or her right to be present at any stage of the proceedings, except for sentencing, provided the waiver complies with the provisions of Rule 9.1(b)(1).

Rule 9.1 (b)(1) states, in pertinent part:

> Except as provided in subsection (2), a defendant may waive the right to be present at any proceeding in the following manner:
>
> (i) With the consent of the court, by an understanding and voluntary waiver in open court [...]

The exceptions stated in Rule 9.2(b)(2) are as follows:

> A defendant may not waive the right to be present if: (i) The defendant is not represented by counsel at the proceeding at which the defendant is not present, except in minor misdemeanor cases or proceedings conducted after the defendant has been adjudicated guilty; or (ii) The defendant has been convicted of an offense that may be punishable by death and sentence is being imposed.

The Alabama Court of Criminal Appeals has repeatedly recognized that Rule 9.1, as amended in 1997, allows a capital defendant to waive the right to be present at any stage of the trial, except sentencing. *See Gamble v. State*, 791 So. 2d 409, 422 n.4 (Ala. Crim. App. 2000); *Melson v. State*, 775 So. 2d 857, 873 n.2 (Ala. Crim. App. 1998); *Jackson v. State*, 791 So. 2d 979, 1004 n.5 (Ala. Crim. App. 2000).

The record in this case shows that Robitaille "asked to be excused from the courtroom during the showing of the autopsy photographs." (R. 613.) This motion was granted. (Id.) The record also shows that Robitaille returned to the courtroom after Dr. Embry's testimony. (R. 693.)

During Robitaille's case-in-chief, on direct examination, the following conversation took place:

> Defense counsel: You know that the autopsy report shows that she was stabbed with scissors. I have told you that, haven't I?
>
> Robitaille: Yes, sir.
>
> Defense counsel: You weren't in here during the autopsy report?
>
> Robitaille: No, sir, I didn't want to look at it.
>
> Defense counsel: I guess we should explain. Tell the jury why you were not in here?(sic)
>
> Robitaille: I thought the world of Trent and Robin, and Alisa and Stuart and them (sic) have been good to me, you know. I mean, I just didn't want to see them.
>
> Defense counsel: And did you ask me to ask the judge to let you be excused?
>
> Robitaille: Yes, sir.

(R. 1136.) For Robitaille to assert in his petition that his decision to leave the courtroom was anything but expressed and voluntary is disingenuous. Furthermore, it

is also apparent that this was not the sentencing phase of Robitaille's capital murder trial. Therefore, according to Rule 9.1, Robitaille was entitled to "waive the right to be present." (Ala. R. Cr. P. 9.1(b)(1))

For the foregoing reasons, Robitaille's claim that the trial court improperly removed him from the courtroom during the trial is without merit. This Court, therefore, should deny certiorari review of this claim.

II. This Court Should Not Grant Certiorari To Review Robitaille's Claim That The Trial Court Improperly Allowed Hearsay Testimony.

In Issue II of his petition, Robitaille complains that the trial court admitted "hearsay, eight times removed from the courtroom, which testimony was to the effect that Wilson Robitaille was guilty of the murders." (Pet. at 12.) For the following reasons, this Court should deny certiorari review of this claim.

A. This Claim Is Not Worthy Of Certiorari Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye*, 372 U.S. at 436; Rule 10, Rules of the Supreme Court of the United States ("A petition for writ of certiorari will be granted only for compelling reasons."). In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact.

Robitaille has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the claim raised by Robitaille is very fact-specific, and a decision on his claim will apply only to his case. Because it is of such narrow scope and limited

precedential value, his claim is not worthy of certiorari consideration. Certiorari should be denied for this reason alone.

B. This Court Should Deny Certiorari Because This Claim Is Without Merit.

In his petition, Robitaille complains that the trial court allowed hearsay testimony. (Pet. at 11-13.) The Court of Criminal Appeals addressed this claim in its opinion, *Robitaille v. State*, CR-01-2271, 2005 WL 3118795, at *9-12 (Ala. Crim. App. Nov. 25, 2005). Because none of those three examples constitute hearsay, this Court should deny certiorari review.

1. Robitaille's allegation concerning James Robitaille's testimony is without merit because it is not hearsay.

In its opinion denying this claim, the Alabama Court of Criminal Appeals properly found the following:

> During James Robitaille's testimony the following occurred:
>
> "Q [Prosecutor]: On May 11 of last year do you recall an incident involving your brother?
>
> "A [James Robitaille]: Yes.
>
> "Q [Prosecutor]: How did you first come to hear about that?
>
> "A [James Robitaille]: Off of the news. I was fishing and a girl that I know, one of my friends, called me and was messing around with the phone and she asked me, she said, 'Which one of your brothers done went out here and killed somebody.' I didn't know what to think. And I said,

> 'Are you sure.' And she said, 'Yes.' I turned around, me and my wife, went to the house where he was at."
>
> James Robitaille then explained that he had told the authorities where they could locate his brother.
>
> Rule 801(c), Ala. R. Evid., states: " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."
>
> James Robitaille's testimony as to what someone else told him was not offered to prove the truth of the matters asserted. "'[The hearsay rule] does not exclude extrajudicial utterances offered merely to prove the fact of the making or delivery thereof, or to explain subsequent conduct of a hearer.' " *Ashford v. State*, 472 So. 2d 717, 719 (Ala. Crim. App. 1985), quoting 22A C.J.S. Criminal Law § 718 (1961). The testimony was offered to show why James Robitaille telephoned the authorities. This testimony was not hearsay and was correctly admitted into evidence.

Robitaille, 2005 WL 3118795, at *9. Because the statement by James Robitaille was not being "offered to prove the truth of the matter asserted," it is nonhearsay. *Ex parte Bunn*, 611 So. 2d 399, 400-01 (Ala. 1992). The Alabama Court of Criminal Appeals correctly found that this testimony was not hearsay, therefore, the claim is not worthy of this Court's certiorari review.

2. Robitaille's allegation concerning Heath Taylor's testimony is without merit because the statement is not hearsay.

In its opinion denying this claim, the Court of Criminal Appeals properly found the following:

> Robitaille argues that it was error to allow Investigator Heath Taylor to testify as to what others told him during the investigation. Specifically, he argues that the following testimony was hearsay:
>
> "Q [Prosecutor]: On May 11 of last year did you get a call involving Wilson Earl Robitaille?
>
> "A [Taylor]: Yes, we did.
>
> "Q [Prosecutor]: What was the nature of that call?
>
> "A [Taylor]: That Sheriff Boswell had received a call from Marion County Sheriff, I assume that's who called Sheriff Boswell, and asked them for some assistance in trying to locate Mr. Robitaille in a case they had that morning in Hamilton.
>
> "Q [Prosecutor]: What did you do next?
>
> "A [Taylor]: At about five o'clock p.m. Sheriff Boswell called myself and our Patrol Lieutenant and our Chief Deputy to the office and he explained to us what happened up there in Hamilton and said that Mr. Robitaille was currently living here on Laurel Street off of Woodland Drive in Phenix City. He asked if I would

pick up the case from there, try to locate Mr. Robitaille and see if there was any violations that probation holds or anything for Hamilton that we could have.

"Q [Prosecutor]: Who is Sheriff Purser?

"A [Taylor]: Sheriff of Marion County. In my best recollection, I was told, or learned, that he had made some phone calls to the sheriff of Russell County to learn the whereabouts of Mr. Robitaille."

We have reviewed the pages cited by Robitaille in his brief to this Court; the pages contain testimony concerning the course of the investigation and its focus on Robitaille as the primary suspect.

As we stated in *Wilson v. State*, 571 So. 2d 1237, 1240-41 (Ala. Crim. App. 1989), *rev'd on other grounds*, 571 So. 2d 1251 (Ala.1990):

" '[M]any statements have been admitted as exceptions to the hearsay rule upon the rationale that such statements were admitted for some purpose other than to prove the truth of the statements.' [C. Gamble, *McElroy's Alabama Evidence* § 242.01(1) (3d ed.1977)]. *See also Clontz v. State*, 531 So. 2d 60, 61 (Ala. Crim. App. 1988) (wherein a probation officer was allowed to testify that he first became aware the defendant was not at his address through a telephone call from the appellant's mother, because 'the testimony was not introduced as proof of

the matter asserted, but rather as the motive behind the probation officer's beginning his investigation'); *Molina v. State*, 533 So. 2d 701, 714 (Ala. Crim. App. 1988), *cert. denied*, 489 U.S. 1086, 109 S. Ct. 1547, 103 L. Ed. 2d 851 (1989) (wherein a police officer was allowed to testify to information concerning a vehicle suspected to be involved in drug activity, received through a radio dispatch, because it was not offered to prove the truth of the contents of the dispatch, but 'to explain the reason he pursued and subsequently stopped the defendant'); *Petite v. State*, 520 So. 2d 207, 211 (Ala. Crim. App. 1987) (a radio broadcast, stating that a burglary was in progress, was not hearsay as it was not introduced to prove the truth of the matter asserted, 'but rather for the purpose of explaining why Officer Stafford went to the property'); *Thomas v. State*, 520 So. 2d 223, 226 (Ala. Crim. App. 1987) (wherein an officer was allowed to identify people he spoke with and places he went before finding the defendant, because '[t]he fact of the conversations ... was offered to explain the officer's actions and presence at the scene-not for the truth of the matter asserted')."

More recently in *Deardorff v. State*, [Ms. CR-01-0794, June 25, 2004] ---So.2d ----, ---- (Ala. Crim. App. 2004), we stated:

"A review of the record demonstrates that Agent Montgomery's testimony and Karen

and Greg's testimony about Turner's will, and particularly the addendum to the will, was given in context of the investigation of the case and the reasons for the actions the police took. It was by definition not hearsay and it was properly admitted into evidence. We have considered cases presenting similar circumstances and have found no error in the admission of the testimony. For example, in Smith v. State, 795 So. 2d 788 (Ala. Crim. App. 2000), a police officer testified that, during a search of the house belonging to the defendant's mother, she told him that the defendant had put some clothes in the washing machine; Smith argued that the testimony was prejudicial hearsay. We held:

" '[T]his statement was elicited to establish the reasons for the officer's action and the reasons the officers searched certain areas of the trailer. It was not offered for the truth of the matter asserted and was not hearsay. "The fact of the conversations in this case was offered to explain the officer's actions and presence at the scene-not for the truth of the matter asserted. Accordingly, it was not hearsay. *Clark v. City of Montgomery,* 497 So. 2d 1140, 1142 (Ala. Crim. App. 1986)." *Thomas v. State,* 520 So. 2d 223 (Ala. Crim. App. 1987).'

"795 So.2d at 814.

"In *D.R.H. v. State,* 615 So. 2d 1327 (Ala. Crim. App. 1993), the appellant argued

> that hearsay had erroneously been admitted when the officers were permitted to testify about what the confidential informant had told them. We disagreed, found that the evidence was not hearsay, and stated, '[The officers'] testimony was received to show the reasons for the officers' actions and how their investigation focused on a suspect. *Sawyer v. State*, 598 So. 2d 1035 (Ala. Crim. App. 1992).' 615 So. 2d at 1330. *In accord, Miller v. State*, 687 So. 2d 1281, 1285 (Ala. Crim. App. 1996)."
>
> The challenged testimony was by definition not hearsay and was properly admitted into evidence.

Robitaille, 2005 WL 3118795, at *9-11. Heath Taylor was merely explaining that he was looking for Robitaille because his office had received a request from the Marion County Sheriff's Office to do so. The testimony was not offered to prove that there was such a request, nor was it offered to prove that Robitaille was a murderer. Therefore, because the statement is not being "offered to prove the truth of the matter asserted," it is nonhearsay. *Bunn*, 611 So. 2d at 400-01.

3. Robitaille's allegation concerning Officer Jerry Feltman's testimony is without merit because the statement was elicited by defense counsel and because Robitaille was not unfairly prejudiced by the statement.

In its opinion denying this claim, the Court of Criminal Appeals properly found the following:

> Robitaille also argues that it was reversible error to elicit testimony from

Officer Jerry Feltman, chief of the Hamilton Police Department, as to what John Fikes had told police. The following occurred:

"Q [Defense counsel]: Mr. [John] Fikes had just come forward to the other officer once he heard about the murders?

"A [Officer Feltman]: No. Once I got here and I observed the scene, at that point I started putting out information trying to locate 'Billy' Robitaille. I wanted to know where he was, where he had been. And as we are putting this information out trying to gather the information, we obtained the information from Mr. Fikes that 'Billy' Robitaille had been to his house earlier that day."

Initially, we observe that the above question was elicited from defense counsel, not the State; therefore, if error did occur it was invited by defense counsel's question. "Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby." Phillips v. State, 527 So.2d 154, 156 (Ala.1988). "The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error." Snyder v. State, 893 So.2d 488, 518 (Ala.Crim.App.2003).

Moreover, the record shows that John Fikes testified that Robitaille had stopped

by his house on the day of the murders. As we have stated:

> " 'Testimony that may be apparently inadmissible may be rendered innocuous by subsequent or prior lawful testimony to the same effect or from which the same facts can be inferred.' *Yeomans v. State*, 641 So. 2d 1269, 1272 (Ala. Crim. App. 1993). 'The erroneous admission of evidence that is merely cumulative is harmless error.' *Dawson v. State*, 675 So. 2d 897, 900 (Ala. Crim. App. 1995), *aff'd*, 675 So. 2d 905 (Ala. 1996)." *Snyder v. State*, 893 So. 2d 488, 545 (Ala. Crim. App. 2003).
>
> For these reasons we find no plain error.

Robitaille, 2005 WL 3118795, at *11-12. This testimony was elicited by defense counsel; any error would, therefore, be invited. *See Taylor v. State*, 808 So. 2d 1148, 1202 (Ala. Crim. App. 2000) ("a party cannot allege as error proceedings in the trial court that were invited by him or that were a natural consequence of his own action"). Also, John Fikes later properly testified during the State's rebuttal that Robitaille had been to his home on the day of the triple-homicide. (R. 1195.) Thus, if this Court were to determine this were hearsay, Robitaille could not have been unfairly prejudiced by Feltman's testimony.

For the reasons outlined above, Robitaille has not shown that he has suffered harm from any hearsay testimony. As such, this Court should deny certiorari review of this claim.

III. This Court Should Not Grant Certiorari To Review Robitaille's Claim That The Prosecutor Made Improper Comments At Trial.

In Issue III of his petition, Robitaille complains that the prosecutor improperly shouted "Bravo" at the end of his testimony on direct examination and that the prosecutor gave unsworn testimony at trial. (Pet. at 11, 13-15.) Neither of these assertions is worth of this Court's certiorari review.

A. This Claim Is Not Worthy Of Certiorari Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye*, 372 U.S. at 436; Rule 10, Rules of the Supreme Court of the United States ("A petition for writ of certiorari will be granted only for compelling reasons."). In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact.

Robitaille has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the claim raised by Robitaille is very fact-specific, and a decision on his claim will apply only to his case. Because it is of such narrow scope and limited precedential value, his claim is not worthy of certiorari consideration. This Court should, therefore, deny certiorari review of this claim.

B. This Court Should Deny Certiorari Because This Claim Is Without Merit.

In his petition, Robitaille complains that the prosecutor improperly shouted "Bravo" at the end of his testimony on direct examination and that the prosecutor

gave unsworn testimony at trial. (Pet. at 11, 13-15.) The Alabama Court of Criminal Appeals denied relief on these allegations. *See Robitaille v. State*, CR-01-2271, 2005 WL 3118795, at *15-16 (Ala. Crim. App. Nov. 25, 2005). Because none of the prosecutor's statements infected the trial with unfairness, this Court should deny certiorari review.

1. The prosecutor did not infect the trial with unfairness when he said "Bravo" at the end of Robitaille's testimony.

In its opinion denying this claim, the Alabama Court of Criminal Appeals properly found the following:

> Robitaille first argues that the prosecutor improperly applauded and shouted "Bravo" after Robitaille had concluded his testimony. The following occurred at the end of Robitaille's testimony:
>
> "[Prosecutor]: (Clap, clap, clap, clap, clap).
>
> "[Defense counsel]: Judge, I object.
>
> "[Prosecutor]: Bravo.
>
> "The Court: Sustained.
>
> "[Defense counsel]: I move for a mistrial.
>
> "The Court: Don't do anything like that again.
>
> "[Prosecutor]: Yes, sir."
>
> The record shows that at the beginning of trial the circuit court instructed the jury that anything the attorneys said was not evidence. Also, during closing

> statements the prosecutor apologized for his conduct and said:
>
> "I do want to apologize for two things. First of all, the fool stunt I played yesterday when I stood up and I clapped. I never should have done that and I apologize to y'all. Never should have. That was what I call a mistake from the heart. I was so furious, I just, that clouded my judgment. I should not have done that. That was wrong. I apologize if that offended anybody on the jury. That never should have happened. I'm experienced enough, I'm old enough, and I should have known better, and I do apologize."
>
> While we do not condone the prosecutor's actions, we cannot say that they so infected the trial with unfairness that Robitaille was denied a fair trial. *See Darden v. Wainwright*, 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986).

Robitaille, 2005 WL 3118795, at *15. Statements made by attorneys during the course of a trial are never to be considered as evidence, and this Court considers this to be an important factor in denying a claim of improper comment during a closing argument. *Darden v. Wainwright*, 477 U.S. 168, 182 (1986) ("The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that arguments of counsel were not evidence").

In this case, the judge instructed the jury that arguments of counsel are not to be considered evidence. (R. 337.) The prosecutor also informed the jury that statements by the attorneys are not to be considered

evidence. (R. 339.) Thus, Robitaille must make a showing of prejudice strong enough to overcome the presumption that the jury, following its instructions, did not consider the arguments of counsel as evidence in reaching its decision. Robitaille has failed to meet that burden. Applying this Court's ruling in *Darden*, the Alabama Court of Criminal Appeals correctly concluded that the prosecutor's comment did not so infect the trial as to strip Robitaille of his due process rights.

2. The prosecutor's remarks about his personal experience with drug crime prosecution did not infect the trial with unfairness.

In its opinion denying this claim, the Alabama Court of Criminal Appeals found as follows:

> Robitaille also argues that the prosecutor improperly testified when he was cross-examining Robitaille. The following occurred:
>
> "Q [Prosecutor]: You said [Stuart Taylor] gave you 17 pounds of drugs?
>
> "A [Robitaille]: Yes, sir.
>
> "Q [Prosecutor]: Seventeen pounds of what?
>
> "A [Robitaille]: Crystal meth.
>
> "Q [Prosecutor]: Crystal meth. You may or may not know, I'm the narcotics prosecutor for Marion County and Winston County and have been for the past nine years before being D.A. If we ever saw 17 pounds of dope, we would about fall out in the floor."

Robitaille did not object to the issue now raised on appeal; therefore, we evaluate this claim for plain error. *See* Rule 45A, Ala. R. App. P.

The above remarks were, at the time, based on facts not in evidence. However, on rebuttal the State presented the testimony of Bobby Blaylock, chief agent for the Marion County Drug Task Force. Blaylock testified:

"Q [Prosecutor]: What is the standard unit of sale for methamphetamine?

"A [Blaylock]: Generally you buy, if you are just looking at a street buy, generally we try to go for a gram. That's our standard street buy. Of course, if we go into, you know, to try to get some weight, we will go for what is commonly called an eight ball, a little over three and a half grams methamphetamine. It is rare that people are willing, in our area to deal with a lot of street sales, but we have been able to make dealings on ounces to be delivered.

"Q [Prosecutor]: That's pretty large amount one ounce?

"A [Blaylock]: Yes, sir.

"Q [Prosecutor]: Rarely can you make a deal for that much?

"A [Blaylock]: It doesn't come as often as we would like."

> Based on the evidence that was submitted in rebuttal we cannot say that the prosecutor's remarks so infected the trial with unfairness that Robitaille was denied a fair trial.
>
> Moreover, we have reviewed all the remarks made by the prosecutor and can find no evidence that any remarks so infected the trial with unfairness that Robitaille was denied a fair trial. *See Darden v. Wainwright.*

Robitaille, 2005 WL 3118795, at *15-16. The prosecutor's comment was made in response to Robitaille's testimony that he was to deliver seventeen pounds of crystal methamphetamine to Tennessee. (R. 1110.) Robitaille did not object to this statement. Moreover, the jury was instructed that statements by the attorneys are not to be considered evidence. Any prejudice that Robitaille may have suffered as a result of this comment was remedied by calling the rebuttal witness, Bobby Blaylock, of the Marion County Drug Task Force. (R. 1229.) Blaylock's testimony undermines Robitaille's credibility that he was to deliver seventeen pounds of methamphetamine. The standard unit for sale, Blaylock testified, is usually done in grams, sometimes even an ounce. (R. 1239.)

Robitaille's claim, reviewed for plain error, shows that the prosecutor's comments were well within the scope of proper comment and argument. As a result, Robitaille suffered no prejudice. Applying this Court's ruling in *Darden*, the Alabama Court of Criminal Appeals correctly concluded that the prosecutor's comment did not so infect the trial as to strip Robitaille of his due process rights.

Because neither the "Bravo" comment nor the prosecutor's drug prosecution comments infected the trial with unfairness, this claim is without merit. As such, this Court should deny certiorari review.

IV. This Court Should Not Grant Certiorari To Review Robitaille's Claim That Trial Counsel Provided Ineffective Assistance Of Counsel.

In Issue IV of the petition, Robitaille asserts that Alabama law does not allow for judicial review of trial counsel's performance during direct appeal. (Pet. at 12, 15-19.) Certiorari should be denied on this claim for the following reasons.

A. This Claim Is Not Worthy Of Certiorari Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye*, 372 U.S. at 436; Rule 10, Rules of the Supreme Court of the United States ("A petition for writ of certiorari will be granted only for compelling reasons."). In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact.

Robitaille has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the claim raised by Robitaille is very fact-specific, and a decision on his claim will apply only to his case. Because it is of such narrow scope and limited precedential value, his claim is not worthy of certiorari consideration. This Court should, therefore, deny certiorari review of this claim.

B. This Court Should Deny Certiorari Because This Claim Is Without Merit.

In his petition, Robitaille complains that Alabama law does not allow for judicial review of trial counsel's effectiveness on direct appeal. (Pet. at 12, 15-19.) In fact, the Alabama Court of Criminal Appeals addressed and rejected Robitaille's ineffective assistance of trial counsel claim in its opinion, *Robitaille v. State*, CR-01-2271, 2005 WL 3118795, at *21 (Ala. Crim. App. Nov. 25, 2005), holding that "[i]n *Ex parte Frazier*, 758 So. 2d 611 (Ala. 1999), the Alabama Supreme Court noted that the Court of Criminal Appeals is obliged by Rule 45A, Ala. R. App. P. to review a claim of ineffective assistance of counsel on direct appeal in a death-penalty case." More recently, the Alabama Court of Criminal Appeals considered during direct appeal review an ineffective assistance of counsel claim in a death-penalty case. *Woods v. State*, CR-05-0448, 2007 WL 2459716, at *32-33 (Ala. Crim. App. Aug. 31, 2007).

Furthermore, the Alabama Court of Criminal Appeals addressed the following claims on direct appeal and correctly denied relief: that counsel failed to object to hearsay evidence and to leading questions; that his counsel was ineffective for failing to request expert assistance in securing DNA evidence, investigating evidence of mitigation, and conducting a private investigation and a mental evaluation; that counsel failed to present any meaningful evidence in mitigation; that counsel failed to subpoena and interview witnesses; and that counsel was ineffective for failing to conduct any factual investigation of the case. *Robitaille*, 2005 WL 3118795, at *22-26.

Because Alabama does provide for review of ineffective-assistance-of-counsel claims on direct appeal and because the Alabama Court of Criminal Appeals

specifically addressed and denied Robitaille's ineffective-assistance-of-counsel claims on direct appeal, this Court should deny certiorari.

CONCLUSION

For the reasons set forth above, this Honorable Court should deny Robitaille's petition for writ of certiorari.

Respectfully submitted,

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